UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 02-747-C

PAUL A. SIMS, ET AL., **PLAINTIFFS**

V. **ORDER**

OHIO CASUALTY INSURANCE COMPANY, ET AL., **DEFENDANTS**

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On December 13, 2002, the defendants removed the present action from the Nelson Circuit Court to this court based on federal question jurisdiction. On September 15, 2003, this court entered an order dismissing the plaintiffs' claims in part, including the plaintiffs' federal claims, and remanding the remaining state law claims to the Nelson Circuit Court (Docket No. 74). This matter is not before the court on the motion of defendants Prudential Insurance Co. of America and Prudential-Bache Securities, Inc. (the "Prudential defendants") for an extension of time to answer the amended complaint and to alter the court's order (Docket No. 80); the motion of defendants Peoples State Bank, Nelson Bancorp, Inc., and James O. King. Jr., to for an extension of time to answer the amended complaint ant to alter the order (Docket No. 81); the motion of defendant First Union Bank, N.A., for an extension of time to answer the amended complaint (Docket No. 82); the motion of defendant First Union for reconsideration (Docket No. 83); the motion of defendant Barnett Bank of Tampa, N.A., for an extension of time to answer the amended complaint (Docket No. 84); the motion of defendant Barnett Bank to dismiss the first amended complaint (Docket No. 85); the motion of defendant Barnett Bank to alter the judgment (Docket No. 86); the motion of the Prudential defendants to dismiss the first amended complaint (Docket No. 87); and the motion of defendants {Peoples[;es State Bank, Nelson Bancorp, and James O. King, Jr., to dismiss the first amended complaint or in the alternative for summary judgment (Docket No. 88). The plaintiffs have filed a motion to reconsider in the Nelson Circuit Court.

I. Subject Matter Jurisdiction

The plaintiffs argue that the court found they had failed to state a claim under federal law, that they consequently lacked standing to bring their RICO claims and, therefore, that this court lacked subject matter jurisdiction over this case. In a related argument, the plaintiffs also contend that the court found the plaintiffs' federal claims so insubstantial that the court lacked subject matter jurisdiction over the case. For the reasons stated in the court's prior order and the reasons stated below, this court in its discretion ordered the case remanded after finding that the plaintiffs had failed to state a federal claim under RICO, not because this court lacked subject matter jurisdiction over the case.[36] The court will address the standing argument first.

A. Standing

The plaintiffs appear to equate constitutional standing with statutory standing under RICO. Constitutional standing requires an injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For standing to sue under RICO, the plaintiff must show injury resulting from alleged predicate acts constituting a RICO violation. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985); *J.S. Serv. Ctr. v. Gen. Elec. Technical Serv.*, 937 F. Supp. 216, 220 (S.D.N.Y. 1996); *Yancoski v. E.F. Hutton & Co., Inc.*, 581 F.Supp. 88, 96 (E.D. Pa. 1983). Lack of RICO standing does not equate to lack of constitutional standing, nor is lack of RICO standing even sufficient to bar the district court from exercising supplemental jurisdiction over state law claims, as the Second Circuit explicitly held in *Lerner v. Fleet Bank, N.A.*:

> We hold that lack of RICO standing does not divest the district court of jurisdiction over the action, because RICO standing, unlike other standing doctrines, is sufficiently intertwined with the merits of the RICO claim that such a rule would turn the underlying merits questions into jurisdictional issues. . . . Finally, we find the district court may, in its discretion, exercise

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1. The court notes the existence of some inconsistency in the plaintiffs' arguments that their RICO claims are so insubstantial that this court lacks federal question jurisdiction and jurisdiction under standing grounds in light of the plaintiffs' motion in state court to reinstate these same "wholly insubstantial RICO claims.

> supplemental jurisdiction over the state-law claims in [one of the cases before the court] because RICO standing is not a jurisdictional prerequisite the absence of which would divest the district court of the original jurisdiction required to support supplemental jurisdiction.

318 F.3d 113, 117 (2d Cir. 2002)(finding that lack of proximate cause between RICO predicate acts and plaintiff's injury did not preclude constitutional standing); *Jersevic v. Kuhl,* 2002 WL 84624 (E.D. Mich. 2002)(finding constitutional standing despite plaintiff's failure to state a claim under RICO); *see also Bell v. Hood,* 327 U.S. 678, 681-82 (1946)("[Subject matter jurisdiction] is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a case of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

The court found that the plaintiffs failed to state a claim under RICO; the plaintiffs, therefore, lack RICO standing. The court did not find, and does not find, that the plaintiffs lack constitutional standing – the plaintiffs have presented an injury-in-fact, causation, and redressability sufficient to satisfy the constitutional requirements.[37] The dismissal of all federal claims for failure to state a claim did not divest this court of jurisdiction on standing grounds.

B. "Wholly Insubstantial" Claims

The plaintiffs also argue that the court's remand of the case should have been under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction rather than 28 U.S.C. § 1367(c)(#). In its order or remand, the court found that it did retain the discretion to exercise supplemental jurisdiction over the remaining state claims under 28 U.S.C. § 1367 but declined to exercise that jurisdiction and remanded under subsection (c)(3). (Remand Order at 33 n. 22) The clear implication of this finding was that the court did have subject matter jurisdiction over the action by virtue of the dismissed federal claims. The plaintiffs argue that this finding was in error.

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2. The court does not take the plaintiffs' argument to mean that they have suffered no redressable, cognizable injury at the hands of the defendants.

As the *Bell* Court noted, a ruling that the plaintiff has failed to state a federal claim generally does not divest the court of jurisdiction where such a dismissal is on the merits, rather than for want of jurisdiction. 327 U.S. at 682. A claim is dismissed for lack of jurisdiction "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83. On the other hand, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89 (1998)(quoting *Bell,* 327 U.S. at 685). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim in proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, of otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.,* 523 U.S. at 89 (citation omitted).

The plaintiffs argue that, based on the court's order the RICO claims were "wholly insubstantial and frivolous" and failed to survive to a facial attack on subject matter jurisdiction. *See Ohio Nat. Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir. 1990). While the complaint ultimately failed to plead a RICO claim, the court did not find and need not have found the plaintiff's RICO claim "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *See Blount Financial Services, Inc. v. Walter E. Heller & Co.,* 819 F.2d 151, 152-53 (6th Cir. 1987)(dismissing RICO claims under Rule 12(b)(6) after finding failure to plead fraud). While the plaintiffs did not attempt to argue any novel or difficult questions of law regarding the validity of the RICO claims (with the possible exception of the level of particularity required in pleading),[38] the court nevertheless

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[38]Rather than addressing whether they had pled the RICO fraud requirements with the particularity required under Rule 9(b) or requesting leave to amend their complaint to cure any deficiencies, the plaintiffs argued only that the particularity requirement of Rule 9(b) did not apply to them. (Response to Prudential defendants' motion to dismiss at 24-32; Docket No. 20) The plaintiffs directly addressed the defendant's arguments concerning the substance of the RICO pleadings for the first time

had to construe the bounds of the RICO elements to determine whether the plaintiffs stated a RICO claim. The court was required to determine which of the alleged statements in the plaintiff's extensive factual allegations could legally be considered "misrepresentations," which alleged actions by the plaintiffs or others could legally be considered to have been taken in reliance on any alleged representations, and whet her the defendants legally could be considered to have been acting through an enterprise – that is, which schemes or associations could legally be considered an enterprise.[39] This analysis was not merely a rote or mechanical application of RICO elements but required the court to delve into the details of the complaint to determine whether the plaintiffs had stated a RICO claim. For example, the court was required to consider the import of the activities of Prudential's agents, Tibbitts and Mirzaian; though the court perhaps stated its conclusion inartfully, the court determined that the plaintiffs could not piggy-back their present conspiracy allegations on tenuous connection withy the Tibbitts/Mirzaian fraud and conspiracy. Such consideration of the details of the allegations and how the law should be applied to those allegations is inconsistent with a facial challenge to subject matter jurisdiction although certainly consistent with a dismissal for failure to state a claim under Rule 12(b)(6) or a failure to plead. The court properly found the existence of subject matter jurisdiction.

II. Authority to Reconsider Order

Title 28, section 1447(d) of the Untied States Code states: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise [unless the case was removed pursuant to section 1443]."

The plaintiffs argue that the language of this section bars the court from reconsidering its order. The term "otherwise" in section 1447(d) includes reconsideration by the district court. *See In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996). If this prohibition in section 1447(d) applied to the present remand order, this court

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only in their motion to reconsider, filed in state court.

4. This detailed consideration required of the plaintiffs' RICO pleadings under 18 U.S.C. § 1962(c) is to be contrasted to the absence of any arguable allegation of injury fromt he use of racketeering income under § 1962(a) and the court's corresponding summary handling of that potential claim.

would be barred from reconsidering the order. The section does not apply in this case, however. District courts are required to remand a case to the state court from which it was removed "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). The Supreme Court has held that subsections (c) and (d)'s prohibition on review of remand orders applies *only* to orders remanding the case based on improvident removal or lack of jurisdiction, as under subsection (c). *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 336, 345-46 (1976); *see Long v. Bando Mfg. of America, Inc.*, 201 F.3d 754, 758-59 (6th Cir. 2000)(finding that court was not divested of jurisdiction to hear appeal where district court had not remanded for lack of subject matter jurisdiction). This court remanded in its discretion under 28 U.S.C. § 1367, not for improper removal or lack or subject matter jurisdiction; appellate review of the order, therefore, is not barred by § 1447(d). Because the court of appeals has authority to review the court's order of remand, this court finds that it likewise has authority to reconsider the order.

III. State Law Claims

The court will construe the plaintiffs' objection to the court's jurisdiction as a motion to reconsider the court's decision on the various state claims.[40] The court concludes that, having decided to dismiss the federal claims upon which its jurisdiction rested, it erred in ruling on the state law claims rather than leaving those claims for the consideration of the state court. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996)(discussing the "strong presumption in favor of dismissing supplemental claims"). The court will amend the order to remove the discussion of the plaintiffs' state law claims.

Accordingly,

IT IS ORDERED that the plaintiffs' objections to this court's subject matter jurisdiction (Docket No. 90, et seq.) Are **CONSTRUED** as a motion to reconsider the court's ruling on the state law claims for improper exercise of jurisdiction. The motion is **GRANTED** and the portion of the original order discussing the

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5. The plaintiffs have chosen not to ask this court to reconsider its ruling on the federal claims. The court, therefore, need not reconsider that ruling or address the merits of the federal claims.

state law claims is rescinded. The court will issue separately an amended order.

IT IS FURTHER ORDERED that the defendants' motions to reconsider or to amend the order (Docket Nos. 80, 81, 83, 86) are **DENIED.** The defendants' motions for extensions of time to answer the first amended complaint (Docket Nos. 80, 81, 82, 84, 85, 87, 88) are **DENIED AS MOOT.**

Signed on July 16, 2004

Jennifer B. Coffman, Judge
United States District Court